The test to be applied in regard to the respondent's right to enter the caveat can be found also in *S. K. Das, supra,* at page 324 which reads as follows: —

"The primary test for a caveatable interest may be put on an alternative basis: is the right of the person lodging a caveat capable (i) of specific performance or (ii) of being protected by an interim injunction? 'The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the court'. Richmond, J. said to the caveator's counsel in *In re Kauri Timber Co.* 'You have not *jus in re.* The question is whether, because you might have an injunction against a sale, you may therefore lodge a caveat'."

On the purpose of a caveat the learned author at page 325 said: —

"It enables the caveator to retain the matter *in statu quo* until his claim is adjudicated upon by the court and serves as a notice to the world at large of an outstanding equitable claim. The lodging of a caveat is really in the nature of the initiation of litigation, and only those persons should be entitled to initiate litigation who are entitled to litigate the matter of the dispute which is set up by the caveat, *Municipal District of Concord* v. *Coles* (1905) 3 C.L.R. 96 at p. 108."

The respondent is one of the beneficiaries of Gurdial Singh s/o Cherah Singh. See also his Statutory Declaration in respect of his application to enter the caveat — (Exhibit 'A' in Affidavit affirmed on 24th February, 1973). He is at the moment also one of the holders of Letters of Administration of the Estate of the said Gurdial Singh s/o Cherah Singh (deceased) and is seeking to challenge the validity of transfer of this land. The respondent is in my view a person entitled to apply to enter a private caveat under section 323(1) of the National Land Code.

Section 327(1) of the National Land Code empowers the court to make such order as it may think just. In an application of this nature the learned author of the Torrens System in Malaya said at page 347-348 of his book as follows: —

"In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loth to prevent parties litigating any right that they think they may possess: *In re Caveat of Lewis* (1903) 23 N.Z.L.R. S.C. 581. Where there is a conflict of testimony the caveat will not be discharged."

On the facts and circumstances of this case therefore I dismissed the application to remove the caveat and further ordered the respondent to file the main action within six months from the date of the order.

Application dismissed.

Solicitors: *Inderjit Singh; Athi Nahappan & Co.*

APPOO s/o KRISHNAN v. ELLAMAH d/o RAMASAMY

[O.C.J. (Mohamad Azmi J.) May 14, 1974]
[Kuala Lumpur — Civil Suit No. 838 of 1966]

Land Law — Agreement relating to land — Whether sale agreement or moneylending transaction — Assignment of land registered — Whether title indefeasible — Fraud — Assignment obtained by insufficient or void instrument — Decision by Collector of Land Revenue — Conditional order — Failure to appeal not a bar — Moneylenders Ordinance, 1951, s. 16 — Land Code (F.M.S. Cap. 138), s. 42 and 237.

In this case the plaintiff had made an agreement with the defendant's husband, since deceased, whereby he acknowledged the receipt of $2,500 from the deceased and agreed to execute a power of attorney for the transfer of the land belonging to him to the deceased. It was also agreed that if the sum of $2,500 was repaid before a prescribed date then the application for transfer will be withdrawn or if the land has been transferred it will be retransferred to the plaintiff. Subsequently the deceased succeeded in registering the transfer of the land to him. It was alleged by the plaintiff that the agreement was a moneylender's transaction and that the registration of the transfer was obtained by fraud and by means of an insufficient or void instrument. The defendant on the other hand alleged that the agreement was an agreement for sale, subject to the condition for repayment which the plaintiff had failed to comply with, and therefore the deceased's title was indefeasible.

Held: (1) the agreement in this case was a loan transaction on the security of the land and the transaction was a moneylending transaction and as the agreement was insufficient to constitute a note or memorandum within the meaning of section 16 of the Moneylenders Ordinance, it was therefore unenforceable by reason of illegality;

(2) in this case the plaintiff has proved fraud and misrepresentation on the part of the deceased and that the assignment to the deceased was obtained by means of an insufficient or void instrument, and therefore the deceased's title to the land was not indefeasible, although it was registered in the deceased's name;

(3) the Collector of Land Revenue had not made a final decision against the plaintiff in this matter and as the collector's order was conditional in nature the fact that the plaintiff had not appealed against the decision under section 237 of the Land Code is not fatal to his cause of action in this case.

Cases referred to:-

(1) *Kho Kuang Choon* v. *Phuman Singh* [1965] 2 M.L.J. 189; [1968] 1 M.L.J. 183.

(2) *Subramaniam* v. *Muthiah Chetty* [1934] M.L.J. 222.

(3) *Sundram* v. *Chew Choon Khoon* [1968] 1 M.L.J. 90.

(4) *Wong See Teng* v. *Saraswathy Ammal* [1954] M.L.J. 141.

The following cases were also cited in argument: *Anduvan* v. *Thong Nyik Lin* [1966] 1 M.L.J. 57, *Kemsley* v. *Foot & Ors.* [1951] K.B. 34, *Mahni* v. *Ali & Anor.* [1965] 1 M.L.J. 234, *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105 C.A., *Leong Gan & Ors.* v. *Tan Chong Motor Co. Ltd.* [1969] 2 M.L.J. 8, *Clay* v. *Rufford* (1850) 19 L.J. 295, *Ponnusamy & Anor.* v. *Nathu Ram* (1959) 3 M.C. 260, *Kiong Man* v. *Kishen* [1971] 1 M.L.J. 54, *Gallie* v. *Lee & Anor.* [1969] 1 All E.R. 1062 C.A., *Assets Company Limited* v. *Mere Roihi* [1905] A.C. 176, *In re Monolithic Building Co.* [1915] 1 Ch. 643, *Malaya Borneo Building Society Ltd.* v. *M. Ramachandran* [1959] M.L.J. 182 C.A., *Tueh Guat Choo* v. *Cheah Ah Hoe & Anor.* [1932] M.L.J. 109, *Ratan Singh* v. *Tan Teng Luan & Anor.* [1963] M.L.J. 116, *Periasamy* v. *Public Prosecutor* [1966] 1 M.L.J. 138 F.C., *White & Ors.* v. *Kuzych* [1951] A.C. 585, *Tharmalingam* v. *Sambanthan* [1960] M.L.J. 257, *Kolandaisamy* v. *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 M.L.J. 222, *Akbar Khan* v. *Attar Singh* [1936] 2 All E.R. 545, *Ramasamy* v. *Suppiah* [1969] 2 M.L.J. 187.

CIVIL SUIT.

S. A. Raj for the plaintiff.

G. Vadivelloo for the defendant.

Mohamed Azmi J.: This is a claim in respect of certain land known as E.M.R. No. 5109 Lot Nos. 5422 and 10763 in the Mukim of Tanjong Karang Kuala Selangor, originally held under Approved Application No. 786/50. On October 25, 1950 the plaintiff became the recorded occupant of the said land which comprised of three acres of bendang lot and one acre of kampong lot. As usual, the Approved Application had a restriction in interest whereby the land could not be transferred, charged or leased without the written consent of the Ruler-in-Council. On November 14, 1961, the plaintiff entered into a written agreement with one Fatah Singh, a licensed moneylender, whereby it was agreed that on payment of $2,500 by Fatah Singh to the plaintiff, the latter would submit an application to the Collector of Land Revenue on the same day for the transfer of the said land to Fatah Singh. The full text of the agreement would be reproduced later. On the application of Fatah Singh as attorney of the plaintiff, the latter's right by way of expectation of title in the land in question was assigned by the Collector of Land Revenue Kuala Selangor to Fatah Singh under rule 12(1) of Selangor Land Rules 1930 after the necessary consent of the Ruler-in-Council had been obtained. Consequently, on January 17, 1964, despite objection by the plaintiff (as contained in Exhibit A16), A.A. No. 786/50 was cancelled and a fresh A.A. No. 1/64 was issued and recorded in the name of Fatah Singh. The plaintiff sued Fatah Singh for recovery of the said land in the Magistrate's Court Kuala Selangor, but the case was struck out by the Magistrate with liberty to file a fresh action in the High Court. On July 16, 1966 the plaintiff filed a writ in the High Court against Fatah Singh in respect of the present action claiming for a declaration that he is still the owner and registered proprietor of the said land now comprised in E.M.R. 5109 and registered in the name of Fatah Singh and for other ancillary reliefs. However, Fatah Singh died before the case came up for trial with the result that his widow, Ellamah d/o Ramasamy was brought in as defendant to represent the deceased in these proceedings pursuant to Order of Court dated April 21, 1969. The actual dispute in this case is between the plaintiff and Fatah Singh. Since Ellamah d/o Ramasamy is merely a nominal defendant, and for purpose of convenience, I would refer Fatah Singh as "the deceased" in this judgment.

From the pleadings, it is not in dispute that the deceased had been at all material times a licensed moneylender. It is alleged by the plaintiff that on November 14, 1961 he obtained a loan from the deceased and executed a written agreement in respect of the said loan as security. Pursuant to the agreement, the plaintiff executed a power of attorney in the deceased's favour on the same day. In the agreement, it was provided that repayment of the loan was to be made on or before June 30, 1962. It is alleged that before the expiry of that date the plaintiff did on several occasions approach the deceased to repay the said loan, but he refused to accept. Instead, by means of fraud and misrepresentation the deceased had applied for and obtained permission from the State Authority to assign the land into his own name without the plaintiff's knowledge, and as such the present title of the deceased is not indefeasible. It is further alleged that he has never applied for the assignment of the said land and nor has he authorised the deceased to effect the assignment of the Approved Application as his attorney, and as such the assignment and consequently the registration of the land in the deceased's name was obtained by means of an insufficient or void instrument under section 42(iii) of the F.M.S. Land Code, and the registration is therefore void. The plaintiff further contends that the whole agreement was a moneylending transaction and accordingly whatever documents executed by the deceased are void and of no effect as they contravened the provisions of the Moneylenders Ordinance. In the Statement of Defence, it is denied that on November 14, 1961 the plaintiff borrowed money from the deceased on the security of the said land. It is contended that the land was in fact sold by the plaintiff to the deceased for the sum of $2,500. In paragraph 5 of the Re-Amended Statement of Defence, it is not specifically denied that the power of attorney was executed on the same date as the agreement, but it is averred that the power was given by the plaintiff to the deceased to enable him to sign the necessary documents to complete the sale of the land. The allegation of fraud and misrepresentation is denied, and so is the allegation that the whole agreement was a moneylending transaction. It is the defence contention that the transaction was an outright sale subject to a condition which the plaintiff has failed to comply, and as such the deceased's title is indefeasible.

Based on the pleadings and the evidence adduced, the first question to be determined in this case is whether the agreement dated November 13, 1961 is a moneylending transaction or is it a sale agreement subject to a right of re-purchase within a stipulated time. The plaintiff contends that the agreement amounts to a moneylending transaction with the land as security for the loan. The defendant on the other hand contends that it is a conditional sale. The said agreement is in the following terms:

"*AGREEMENT*

MEMORANDUM OF AGREEMENT MADE AND ENTERED THIS 14TH DAY OF NOVEMBER 1961 Between APPOO s/o KRISHNAN (N.R.I.C. No. 0551650) Certificate of Naturalisation Application No. 1034/54 of Batu 8, Tanjong Karang, Kuala Selangor (hereinafter called the First Party of the one part) and FATEH SINGH s/o MIHAN SINGH (N.R.I.C. No. SL 163886, Fed. Cit. No. 536066) of Tanjong Karang, Kuala Selangor (hereinafter called the Second Party of the other Part) WITNESSETH AS FOLLOWS:—

That the First Party is the registered owner of one Lot of Sawah Land A/a 786/50 S.B. for Kampong Area Lot No. 5422, both in the Mukim of Tanjong Karang and have this date received Dollars Two thousand and Five Hundred ($2,500/-) only towards upset cost of the said Sawah Land and Kampong Area and submitted an application to the Collector of Land Revenue, Kuala Selangor this day for the Transfer of Second Party as the First Party is unable to continue to cultivate same.

That the First Party has this day also executed a Power of Attorney in favour of the Second Party to enable the Second Party to sign the Deed of Transfer when it is approved by the Collector of Land Revenue, Kuala Selangor and that the First Party shall not revoke the said Power of Attorney till such time as the said Sawah Land is transferred.—

That if the transfer of the Sawah Land is not approved for Official reasons then the First Party shall refund the said

amount of $2,500/- and the Second Party shall have no more claim what so ever on the Land in Terms of this Agreement. Further if the First Party repays the said amount of $2,500/- on or before 30th June, 1962 the Application for transfer will be withdrawn, or the land re-transferred in the name of First Party. Note the amount of $2,500/- free of interest in respect of the receipt of the amount on this transaction and that the on demand Note refers to no other than this said transaction of the Land.

That the Second Party shall enter into occupation of the said Sawah Land on the approval of the said application for Transfer or on the 1st day of July, 1962 which ever date the earlier.

In Witness Whereof We have Hereunto Set Our Hands at Kuala Selangor the day and the Year First above Written.

FIRST PARTY

Sd. (In Tamil)

.....

Signature of Appoo s/o Krishnan

SECOND PARTY

Sd. (In Punjabi)

.....

Signature of Fateh Singh s/o Mihan Singh

Witnesses:—

Sd. (In Tamil)

.....

Muthu s/o Veerappan (SL707867K.S)

Sd. (In Tamil)

.....

Selaya s/o Manikam (SL707639)"

To determine the nature of the transaction, it is necessary to examine the agreement in some detail. The first paragraph shows that the agreement was executed on November 14, 1961, and the second paragraph provides that on that date the plaintiff not only received $2,500 towards the "upset cost" of the land but also submitted an application to the Collector of Land Revenue Kuala Selangor for the transfer of the land to the deceased. The third paragraph also states that on the same day the plaintiff executed a power of attorney in favour of the deceased to enable the deceased to sign the deed of transfer when it is approved by the Collector and that the plaintiff undertakes not to revoke the power till such time as the said land is transferred to the deceased. The fourth paragraph provides that in the event of the proposed transfer not being approved by the authority concerned, the plaintiff should refund the $2,500 to the deceased, and that would be the end of the agreement. In the same paragraph, reference is made to an On Demand Note, and it is specially noted that the sum of $2,500 is free of interest. The fifth paragraph specifies the time when the deceased shall enter into occupation of the sawah or bendang lot. In short, according to the agreement, on November 14, 1961 the plaintiff —

(a) received $2,500 from the deceased;

(b) submitted an application to the Collector for assignment of the land to the deceased;

(c) executed a power of attorney in favour of the deceased.

The agreement is unique, in that in paragraph 4 it is provided that, if the plaintiff repaid the sum of $2,500 on or before June 30, 1962, the application for transfer which the plaintiff is said to have submitted to the Collector of Land Revenue on November 14, 1961 would be withdrawn, or if by then the land had been assigned to the deceased, it should be re-assigned to the plaintiff. I believe it is for this reason that learned counsel for the defendant has described the transaction as an outright sale agreement subject only to a condition which the plaintiff has failed to comply. In other words, it is argued for the deceased that since the sum of $2,500 was not repaid on or before June 30, 1962, *i.e.* within seven and a half months from the execution of the agreement, then the sale agreement became enforceable on July 1, 1962. From the evidence, it is not seriously challenged by the plaintiff that no repayment was made before the stipulated time. In this connection, I do not accept the allegation of the plaintiff that before the date prescribed for repayment he had on several occasions approached the deceased to make repayment and the deceased had refused to accept the money. From the evidence before me, I am satisfied that at all material times the plaintiff was never in a position to make any repayment. Even after June 30, 1962, the evidence shows that he had no money to repay the deceased. Thus, by letter dated July 28, 1962 (Exhibit A7) he made a firm offer to pay the deceased interest but not the principal. Again, in his letter dated July 31, 1962 (Exhibit A8) whilst admitting the deceased's right to repayment of the principal sum the plaintiff merely asks for time to repay the loan within a reasonable time. From all the evidence, it can reasonably be inferred that in November 1961 the plaintiff was in need of money and approached the deceased, a licensed moneylender, for a loan. On the proper construction of the agreement, I hold that the transaction cannot be described as a sale agreement, whether conditional or otherwise. In substance, it is clearly a loan transaction on the security of the land in dispute. Although the agreement makes a special note that the amount of $2,500 is free of interest, it also refers to an On Demand Note. Since the On Demand Note has not been produced in evidence, the presumption under section 114(g) of the Evidence Act would arise. Even the letter of demand for possession from the deceased's solicitor dated July 26, 1962 (Exhibit A6) clearly states "... in the event of your failure to return the sum of $2,500 *borrowed* by yourself ...". This letter is an admission that the money was lent to the plaintiff by the deceased and supports the plaintiff's allegation that the agreement was a moneylending transaction. It is therefore inconsistent with the submission of defence counsel that the transaction is a conditional sale agreement. Further, it is inconceivable that in 1961 four acres of padi and kampong land in Tanjong Karang would fetch a mere $2,500. To my mind, this is a clear case where a person has lent a sum of money in consideration of a larger sum being repaid and, as such, the presumption under section 3 of the Moneylenders Ordinance would arise. In this connection, I cannot accept the evidence of the deceased's widow (DW2) that the loan was given free of interest in view of her own admission in cross-examination that she has no knowledge of the transaction. In effect, a loan was given by the deceased to the plaintiff for a period of seven and a half months on the security of the land in dispute and that if the repayment was not made within the period of loan the plaintiff must transfer his rights in the land to the deceased. Clearly, such a transaction is not a sale

agreement. On the evidence, I hold that the agreement is insufficient to constitute a note or memorandum within the meaning of section 16 of the Moneylenders Ordinance. There is therefore non-compliance with the provision of the said Ordinance, and the agreement is therefore unenforceable by reason of illegality. I am satisfied that the plaintiff being an illiterate man never had any intention to assign his rights in the Approved Application to the deceased when he executed the agreement. He was clearly led to believe that the agreement was executed merely for the purpose of evidencing the loan.

Although there is a dispute as to the amount of loan received by the plaintiff from the deceased, to my mind even if the sum of $2,500 and not $1,500 was to be accepted, the fact remains that on the proper construction of the agreement and having regard to the evidence as a whole there can be no doubt that the money was given by the deceased to the plaintiff as a loan on the security of the land in dispute. The so-called sale agreement is clearly a sham. The fact that the plaintiff tried to borrow $2,500 from the Padi Planters Board as disclosed in Exhibits A10 and A11 is relevant only to the actual amount lent by the deceased to the plaintiff, but it does not alter the fact that the agreement was a moneylending transaction. In Exhibit A11 the plaintiff apparently informed the Padi Planters Board that the purpose of applying for the loan was to settle his debts to the deceased. This again confirms that the agreement is not a conditional sale transaction as alleged by the defence.

Learned counsel for the defence has urged the court that the agreement of November 14, 1961 should be read together with the application purported to have been made by the plaintiff for permission to assign dated November 13, 1961 (Exhibit D3), the general power of attorney also dated November 13, 1961 (Exhibit D1) and the On Demand Note referred to in paragraph 4 of the agreement. Whilst I agree that in construing the true nature of the agreement the court ought to consider the other documents, there is no justification in the present case to treat the four documents together as if they were one single transaction. In the first place, the On Demand Note was never in fact produced by the defence. Since the presumption under section 3 of the Moneylenders Ordinance has arisen, its non-production gives rise to adverse presumption against the deceased under section 114(g) of the Evidence Act, in that if it had been produced it would have supported the plaintiff's allegation that the agreement was a moneylending transaction and not a sale agreement. Secondly, the agreement refers to an application by the plaintiff for permission to assign submitted to the Collector of Land Revenue on November 14, 1961, whereas Exhibit D3 appears to have been submitted to the Collector on November 13, 1961. Similarly, the agreement refers to a power of attorney executed on November 14, 1961 and whereas the general power of attorney produced in court (Exhibit D1) was executed on November 13, 1961. Under the circumstances, Exhibit D1 and Exhibit D3 are not the power of attorney and the assignment application referred to in the agreement.

The next main issue for determination is whether the deceased's title to the land is indefeasible. From decided cases quoted by learned counsel, it seems to be the law that illegality as distinct from fraud is not sufficient to defeat the deceased's title in the land. (See *Kho Kwang Choon* v. *Phuman Singh*[1]). The relevant provision of section 42 of the F.M.S. Land Code (Cap. 138) also states: —

> "(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.
>
> (ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.
>
> (iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void."

In this case, it is the contention of the plaintiff that apart from fraud and misrepresentation, the assignment of the plaintiff's rights and interest in the land to the deceased was obtained by means of an insufficient or void instrument. There are three particulars of fraud and other allegations of misrepresentation in the Amended Statement of Claim. In the first two particulars of fraud under paragraph 9A, it is alleged that Exhibit D3 which purports to be the plaintiff's application for permission to assign was in fact prepared and submitted by the deceased to the Collector without the knowledge of the plaintiff. Having compared the signature of the plaintiff in the agreement with that in Exhibit D3, I accept the plaintiff's contention that he had no knowledge of the application and that the document was not executed by him. Further, I find it improbable that the plaintiff would agree to execute the application before he received the loan from the deceased. As stated earlier on, Exhibit D3 could not have been the application for assignment referred to in the agreement. It should also be noted that Exhibit D3 was never shown to the plaintiff when he was giving evidence and as such he had no opportunity to examine it as to its authenticity. It is also my finding that the plaintiff did not submit the application to the Collector of Land Revenue on November 13, 1961 as suggested by the defence. If the plaintiff had sent the application on that date, I fail to see the purpose of executing the so-called sale agreement the following day. On the balance of probabilities, even if the application was signed by the plaintiff, it must have been sent to the Land Office by the deceased without the knowledge and consent of the plaintiff. The fact that the solicitor for the deceased had written to the Collector on August 27, 1962 (Exhibit A9) enquiring what action had been taken on the application, shows that only the deceased had knowledge of this document. On receipt of the acknowledgment from the Land Office dated April 13, 1962 (Exhibit D4), the plaintiff appeared to have done nothing about it. In my view, this is consistent with his contention that he never wrote or sent the application, and that there was never any intention on his part to transfer or assign the land to the deceased. Although the Assistant Collector, Encik Zakaria (DW1), said the Land Office acknowledged Exhibit D3 on April 13, 1962, he could not say when the letter was actually received by the Land Office. But on close scrutiny of the document, I believe the date "14/4" written in ink on the margin must be the date of receipt at the Land Office. If so, it is interesting to note that one day before the agreement was execut-

ed, the deceased had already misled the Collector of Land Revenue Kuala Selangor by despatching the letter to the Land Office. Thus, even before the agreement was executed, the deceased had already put the machinery of the Land Office in motion for assigning the land to himself purportedly at the instance of the plaintiff himself. To my mind, the conduct of the deceased in despatching Exhibit D3 and at the same time entering into a transaction on the following day purporting to be a conditional sale agreement, shows *mala fide* on his part and supports the plaintiff's testimony that at the time of executing the agreement the contents as explained to him by the deceased were different from what it is now alleged to be. This constitutes the third particular of fraud where it is alleged that the deceased while making the plaintiff believe that the sum advanced was a loan and that the agreement executed was the proof of such loan, he had already taken fraudulent steps to get the plaintiff's rights and interest under A.A. No. 786/50 to be assigned in his name. In my view, it can reasonably be inferred from the evidence that what the deceased did in this case was to despatch Exhibit D3 to the Land Office thereby misleading the Collector into thinking that the application was submitted by the plaintiff, and then on the following day to enter into the so-called conditional sale agreement with the plaintiff. If it was really the intention of the plaintiff to assign his rights and interest in the land to the deceased, he would have executed and submitted the application on November 14, 1961 as envisaged in the agreement or within reasonable time thereafter. Under the circumstances, I find the plaintiff has proved fraud and misrepresentation on the part of the deceased.

On the question of whether the assignment to the deceased was obtained by means of an insufficient or void instrument, it is the contention of the plaintiff that he executed two powers in favour of the deceased —the first executed on November 13, 1961 (Exhibit D1) and the second executed the following day when the agreement was signed and referred to in the third paragraph of the agreement. The defence, however, contends that the plaintiff only executed Exhibit D1. If, in fact, there were two powers executed as alleged by the plaintiff, then clearly the relevant power of attorney that should have been produced before the Collector and this court is the one executed on November 14, 1961 and not Exhibit D1. However, even if it is accepted that Exhibit D1 was the only power of attorney executed, it cannot be said that the power produced by the deceased before the Collector in support of the application for assignment empowered him to have the land assigned to himself. From Exhibit P5, it must be stressed that the application for assignment of rights was not made by the plaintiff himself but made by the deceased purporting to act as attorney for the plaintiff vide Exhibit D1 (Power of Attorney No. 1042/61). In the words of Encik Zakaria, the Assistant Collector of Land Revenue, the deceased signed both as the recorded occupant in his capacity as attorney for the plaintiff and also as assignee. Thus, assuming that there was only one power of attorney executed in this transaction, it should be noted that the plaintiff had already written to the deceased on June 15, 1962 (Exhibit D2) revoking the power, *i.e.* seven months after the execution of the agreement, and therefore it must have been within the knowledge of the deceased that the plaintiff had no intention to assign the land to him vide Exhibit D1. Having regard to my finding that the agreement is not a sale transaction, as donee, the deceased was a trustee for the plaintiff and they stood in a fiduciary relationship. Yet, in spite of the plaintiff's letter of revocation, the deceased through his solicitor proceeded to use the power of attorney to assign the plaintiff's rights in the land to himself and subsequently had himself registered as the owner of the land. Thus, when the deceased signed the application for permission to assign on March 10, 1963 as attorney for the plaintiff, he certainly was not acting for the plaintiff with his consent or agreement, and the purported consent in the application is a gross misrepresentation by the deceased, and the assignment was therefore obtained by means of an insufficient or void instrument. If the assignment was effected on account of Exhibit D3, for reasons already stated, it is equally obtained by means of an insufficient or void instrument. Exhibit D3 was not executed or submitted by the plaintiff. Further, the application was not in the form as prescribed in Schedule V of the Selangor Land Rules, 1930.

On the ground of fraud and misrepresentation, I hold that the deceased's title to the land is not indefeasible although the land is now registered in the deceased's name under E.M.R. 5109. Since the assignment of the land to the deceased was obtained by fraud, misrepresentation and insufficient instrument, it follows that the registration of the present title is null and void.

It is submitted on behalf of the defendant that the matter in this case is *res judicata* and that this court has no jurisdiction to hear this suit because the matters complained of by the plaintiff had been investigated and enquired into by the Collector of Land Revenue before the assignment was approved, and that the only course open to the plaintiff was to have appealed against the Collector's decision under section 237 of the F.M.S. Land Code. It should first be noted that all that the Collector did was to enquire whether the power of attorney (Exhibit D1) was in fact executed by the plaintiff before a Magistrate, and whether the deceased could act for the plaintiff in the application for assignment. From the evidence, it would appear that the Collector was not aware of Exhibit D2 when he held the enquiry and, as such, he had no opportunity to consider the effect of the letter of revocation on the power of attorney or the agreement. I am confident that if all the relevant documents, particularly the agreement and the letter of revocation of the power of attorney, had been properly scrutinised by the Collector he would not have recommended to the State Executive Council for consent to be given in respect of the assignment. Secondly, it is true that the Collector came to the conclusion that the power of attorney was validly executed but he left it open for the court to decide whether the plaintiff was still the rightful owner of the land. It would therefore appear that on the question of whether the deceased could act for the plaintiff in the application for assignment, which is a question of law, the Collector has rightly left the matter open. On this issue, there is no finality

in his decision. When the Collector issued a fresh Approved Application No. 1/64 to the deceased, it was therefore done on the basis that if the court rules that the rightful owner of the land is the plaintiff then the deceased's Approved Application would be cancelled and the land re-assigned to the plaintiff. This is made clear by the Collector both to the plaintiff and the solicitor of the deceased. (See paragraph 2 of Exhibit A17 and paragraph 3 of Exhibit A18). Strictly, it is not true that he made a final decision against the plaintiff. Since the Collector's order is conditional in nature, the fact that the plaintiff had not appealed against the said decision under section 237 of the Land Code is not fatal to his cause of action in this case. The cases of *Subramaniam* v. *Muthiah Chetty*,[2] *Sundram* v. *Chew Choon Khoon*[3] and *Wong See Teng* v. *Saraswathy Ammal*[4] are distinguishable on the facts. The transaction by which the deceased had become the registered owner of the land in the present case is not a sale transaction. Under the circumstances, the defendant's contention that this court has no jurisdiction to hear this suit and to grant the declaration sought cannot be sustained.

As it is my finding that the agreement of November 14, 1961 is illegal being in contravention of the provisions of the Moneylenders Ordinance, and also that the deceased had exercised fraud, whatever rights the deceased had obtained from the said agreement would be void and of no effect. Nor could the deceased sustain his rights by virtue of Exhibit D3 or the power of attorney executed on November 13, 1961 in view of the clear intention of the plaintiff that the land should not be transferred to the deceased as conveyed to the deceased himself in Exhibit D2 and supported by Exhibit A8. Thus, apart from illegality, fraud and misrepresentation, the assignment of the land to the deceased was obtained by insufficient or void instrument, and it is by virtue of these facts that the land is now registered in the name of the deceased. I therefore hold that the plaintiff is at all material times the rightful owner of the land in dispute both in law and in equity although I have taken into account the fact that at the time when permission for assignment was forwarded to Exco, the deceased was apparently in possession of the land. (See Exhibit D6). Accordingly, I enter judgment for the plaintiff in the following terms: —

(i) A declaration that the plaintiff has been at all material times the recorded occupant of the land formerly known as Approved Application No. 780/50, and is the registered owner and proprietor of the said land now known as E.M.R. 5109, Lot Nos. 5422 and 10763, Mukim of Tanjong Karang, in the locality of Sungei Burong, Kuala Selangor.

(ii) An order that the Power of Attorney No. 1042/61 purported to be drawn by the plaintiff in favour of the deceased (Fatah Singh) is null and void and of no effect.

(iii) A further order that the Assignment or Memorandum of Transfer or other Application drawn and/or executed by the deceased (Fatah Singh) pursuant to the aforesaid Power of Attorney in respect of the said property be set aside.

(iv) A consequential order that the appropriate authority do cancel the fresh Approved Application No. 1/1964 in favour of the deceased, and expunge the name of the deceased (Fatah Singh) from the records of the relevant Land Office.

(v) Costs.

Order accordingly.

Solicitors: *Dato Clough Thuraisingham, Raj & Co.; Xavier & Vadiveloo.*

BALDEV SINGH v. MAHIMA SINGH & ORS.

[O.C.J. (Hashim Yeop A. Sani J.) May 24, 1974]
[Kuala Lumpur — Civil Suit No. 449 of 1973]

Companies — Private company — Issue of shares — Articles of association — Resolution of general meeting — Binding on directors — Decision of directors to issue shares — Decision not in accordance with resolution of general meeting — Ultra vires.

In this case the Seremban Town Service Sdn. Bhd. had resolved at its annual general meeting to incorporate Malay participation in the company and to have such Malay participation up to 30% of the issued and paid up capital of the company from shareholders approved by the Negri Sembilan Transport Operators' Association. The directors of the company subsequently decided to issue shares to Malay employees of the company but these persons were not approved by the Negri Sembilan Transport Operators' Association.

Held: (1) the decision of the directors was against the resolution of the Annual General Meeting as the persons to whom it was proposed to allot shares were not persons approved by the Negri Sembilan Transport Operators' Association and therefore it was in contravention of the Articles of association and *ultra vires*;

(2) an injunction should be issued to restrain the directors from holding any directors' meeting to approve the issue of shares to persons other than to persons described in the resolution of the annual general meeting.

Cases referred to:-

(1) *Rattan Singh & Ors.* v. *Managing Director of Moga Transport Company* A.I.R. 1959 Punjab 196.

(2) *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* [1906] 2 Ch. 34.

CIVIL SUIT.

Dulip Singh for the plaintiff.

A. K. J. D'Cruz for the defendants.

Hashim Yeop A. Sani J.: Soon after the civil disorder in 1969 the Government introduced the New Economic Policy and one of its main objectives was to encourage the growth of Malay participation in commerce and industry. Since then it has been the declared policy of the Government to encourage existing and new companies and other business firms and organisations to open their doors to Malays or "Bumiputras" either as employees or as shareholders as circumstances may permit. Most business firms and companies have reacted to this call favourably. However it has also been known that there have been instances where such Malay participation or "Bumiputra participation" is only in form and not in substance *i.e.* in the form of lending of names by certain Bumiputras to business ventures. Business ventures of this kind have been contemptuously referred to by some as the "Ali Baba" system of business *i.e.* businesses which carry